

IN THE SUPREME COURT OF TONGA
DIVORCE JURISDICTION
NUKU'ALOFA REGISTRY

NO. FD.168 of 2014

BETWEEN: *Mrs P*

- **Petitioner**

AND: *Mr V*

- **Respondent**

BEFORE THE LORD CHIEF JUSTICE

Mrs Vaihu for the petitioner

Mr Vahé in person

J U D G M E N T

[1] This is a wife's application for divorce brought under Section 3(1)(g) of the Divorce Act (Cap 29). The section provides that the Court may dissolve the marriage if satisfied:

"that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent"

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- [2] The petition was not opposed. I heard evidence from the petitioner and the respondent appeared before me to confirm that he agreed to the dissolution of the marriage and he also confirmed that the evidence that I heard from the petitioner was correct.
- [3] The parties were married on 28 June 2005 at Tongatapu. They have three children aged between 8 and 2 years. Custody and access arrangements for the children are not in issue and at the end of this brief judgment I will record them.
- [4] The parties have now been living apart since November 2013 when the respondent left the family home for the final time; she having left and returned at least five times previously. Their contact since has been infrequent and related to the care of their children.
- [5] The petition (which I note was not prepared by Mrs Vaihu who appeared on late instructions before me) alleged that the respondent had assaulted the petitioner to her head causing 'bodily harm', that throughout the marriage the respondent spent most of his weekend drinking, that as result of his drinking he did not make adequate provision for the three children of the marriage aged between 8 and 2 years, that the parties had been separated over five times but there had been no change in the respondent's behaviour and that the respondent had engaged in an affair and in drinking with the 'affair woman' which had caused the petitioner 'grief, distress and loneliness'.
- [6] I take guidance as to the meaning of s3(1)(g) from the decisions of Ford J in *Pulini v Masunu* [2001] TOSC 6 and *Fe'ao v Fe'ao* [2001] TongaLawRp 44. In particular, I must decide whether the cumulative

conduct of the respondent was sufficiently serious in all the circumstances of the case that judged from a reasonable person's point of view the petitioner cannot reasonably be except to live with the respondent.

[7] In this case I must disregard the allegation of adultery. Rule 5 of the Divorce Rules requires, in a case where an allegation of adultery is made, that the person with whom it is said adultery was committed be joined as a co-respondent (subject to exceptions that do not apply here). The failure to do so caused the Court to dismiss a petition in *Vaiangina v Lopeti* [2009] TongaLawRp 60. In this case there was no co-respondent joined.

[8] I also disregard as not proved the allegation that the petitioner has not provided for the maintenance of the children of the marriage when he goes drinking as that was not the petitioner's evidence.

[9] However I am satisfied that the grounds for the granting of the order sought are made out. My reasons are as follows.

[10] First, it is not disputed that the respondent has assaulted the petitioner on two occasions during the marriage. The last occasion was in June or July 2013 when the petitioner was punched repeatedly in the head. It appears this was a serious assault as the petitioner was admitted to hospital for treatment and criminal charges have been laid against the respondent which have yet to be heard. Although any form of domestic violence is intolerable in this case there are the aggravating features that violence has occurred on more than one occasion and on the second occasion was of sufficient seriousness as

to require hospital treatment. I note that the respondent offered no excuses or justifications for the assaults.

[10] Secondly, it was also proved that the respondent undertook frequent and serious bouts of drinking which caused severe unhappiness in the marriage. Drinking by one spouse that makes the other unhappy is unlikely to satisfy s3(g). That might be thought of as what has been pejoratively described as part of the ordinary wear and tear of married life. In this case however I am concerned with the cumulative effects of the drinking. The evidence is that the drinking was excessive, frequent and repeated over the period of the marriage, had resulted in the separation of the parties on no less than five occasions and, importantly, had meant the respondent left the home and not returned to his family for extended periods.

[11] My assessment of the particular facts of this case is that the cumulative conduct of the respondent is such that it is unreasonable to expect the petitioner to live with him.

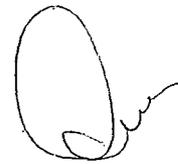
[12] Accordingly I order as follows:

1. The marriage solemnized on 28 June 2005 between the petitioner and respondent is dissolved unless sufficient cause is shown to the Court within six weeks why this decree should not be made absolute.
2. Custody of the children of the family namely *S*, male, born 17 April 2006 and *M*, male, born 2 November 2007 is

granted to the respondent with free access reserved to the petitioner.

3. Custody of the child of the family namely S, female, born 30 November 2012 is granted to the petitioner with free access reserved to the respondent.

Dated: 29 January 2015.

A handwritten signature in black ink, consisting of a large, stylized letter 'Q' followed by a few smaller, connected strokes.

CHIEF JUSTICE